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No. 74-1107

In the Supreme Court of the United States

OCTOBER TERM, 1974

FRANCIS LEO CAPPAERT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, A-1 to A-17) is reported at 508 F.2d 313. The findings of fact, conclusions of law, and order of the district court are reported at 375 F. Supp. 456.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1974 (Pet. App. B, B-1). A timely petition for rehearing was denied on January 31, 1975 (Pet. App. B, B-2). The petition for a writ of certiorari was filed on March 6, 1975. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States, by virtue of a Presidential Proclamation declaring Devil's Hole, formerly part of the public domain, to be a national monument, thereby reserved such underground waters as are required to preserve the pool of water in Devil's Hole and a species of fish whose sole habitat is that pool.

STATUTE AND PROCLAMATION INVOLVED

The Act of June 8, 1906, 34 Stat. 225, 16 U.S.C. 431-433, is reproduced at Pet. App. D, D-1 to D-2. In pertinent part it provides:

> Sec. 2. That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments * * * .

The Presidential Proclamation of January 17, 1952, 66 Stat. C18, 17 Fed. Reg. 691, is reproduced at Pet. App. C, C-1 to C-3.

STATEMENT

The essential facts of this case, which are set forth in the opinion of the court of appeals (Pet. App. A), may be summarized as follows. In 1952, by Presidential Proclamation, "a remarkable underground pool known as Devil's Hole * * * " and the 40 acres surrounding it were withdrawn from the public domain and established as a detached portion of Death Valley National Monument (Pet. App. C, C-1 to C-3). The pool is the sole natural habitat of a "peculiar race of desert fish * * * found nowhere else in the world" (*ibid.*) known as pupfish (Cyprinodon diabolis).

In 1968, petitioners, who had recently acquired nearby lands, began substantial groundwater pumping to support a new ranching venture. Prior to the commencement of this pumping, the water level in the Devil's Hole pool was stable at a level approximately 1.2 feet below a fixed reference point. Thereafter, the pool began to recede, partially exposing a natural rock shelf upon which the fish are heavily dependent for feeding and reproduction.[1] As pumping continued, more and more of the rock shelf became exposed and the pupfish population declined precipitously.

In 1971, the United States initiated this suit to enjoin petitioners from pumping to an extent that would cause exposure of the natural rock shelf. The district court, finding that the reduced water levels caused by petitioners' pumping threatened the extinction of the pupfish, entered a preliminary injunction directing petitioners to curtail their water use. The district court also appointed a special master to determine the quantities of water petitioners could utilize without endangering the fish.

On appeal, the court of appeals, with concurrence of the parties, remanded the case to the district court for entry of a final order. After entry of the order making the injunction permanent, the court of appeals affirmed (Pet. App. A) but directed the district court to retain continuing jurisdiction to determine the precise water level required to ensure survival of the fish.

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[1]The United States has not requested, nor have the courts required, petitioners to restore the pool to its natural level nor completely to terminate their pumping operations; petitioners are required to refrain from causing the level to recede to a point that endangers the fish.

ARGUMENT

1. Petitioners contend (Pet. 11-15) that the decisions of the district court and court of appeals present novel and important questions of water law. However, as the decision below shows, there are no such questions at issue. It is well established that the United States may, by withdrawal of public lands, impliedly reserve such appurtenant unappropriated waters as are required to accomplish the purpose for which the lands are reserved. Such federal reserved water rights may be found in conjunction with the reservation of lands for any appropriate federal purpose. *United States* v. *District Court in and for the County of Eagle,* 401 U.S. 520, 522-523; *Arizona* v. *California,* 373 U.S. 546, 597-602; *Winters* v. *United States,* 207 U.S. 564.[2] Thus, the courts below found that the United States created a federal reserved water right by virtue of the Presidential Proclamation establishing Devil's Hole as a national monument (Pet. App. A, A-5 to A-9).

In order for petitioners to have the right to withdraw waters in derogation of the federal use, it was incumbent upon them to demonstrate that they held a prior perfected water right. But the courts below found that petitioners had not used the waters in question prior to 1968 and that their water right was consequently inferior to the federal water right dating from 1952, when Devil's Hole was reserved as a national monument (Pet. App. A, A-8 to A-10).[3]

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[2]See also *Federal Power Commission* v. *Oregon,* 349 U.S. 435, 447-448.

[3]In regard to the Endangered Species Acts dating from 1966, which petitioners discuss at Pet. 18-19, these Acts were mentioned by the courts below only to demonstrate that a congressionally-established public policy would be frustrated should an injunction fail to issue. The existence of the government's water right was based not on the Endangered Species Acts but on the establishment of the Devil's Hole National Monument in 1952.

2. Petitioners also argue that the withdrawal of Devil's Hole was not authorized by the terms of the Act of June 8, 1906, 34 Stat. 225, 16 U.S.C. 431, permitting the establishment of national monuments and that, in any event, the Presidential Proclamation did not evince any intent to preserve the pupfish (Pet. 16-18).

The Act of 1906 authorizes the President, at his discretion, to declare by public proclamation "objects of historic *or scientific interest* that are situated upon the lands owned or controlled by the Government of the United States to be national monuments * * *" (emphasis added; see p. 2, *supra*). See, also, *Cameron* v. *United States,* 252 U.S. 450, 455-456. As the extensive evidence introduced in this case shows, the pupfish and the pool itself are objects of intense scientific interest. As to the scope of the proclamation, it is clear from its wording (Pet. App. C, C-1) that President Truman intended to preserve Devil's Hole in its natural setting and that one of the primary reasons the hole and pool were deemed worthy of protection was precisely because the unique pupfish live in it. Moreover, the proclamation must be read in conjunction with the National Park Service Act, 39 Stat. 535, 16 U.S.C. 1, which states that the fundamental purpose of all national parks and monuments is to "conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and such means as *will leave them unimpaired to the enjoyment of future generations.*" (Emphasis added.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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